Supreme Court, U. S.
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**APPENDIX**

In The

# Supreme Court of the United States

—o—

October Term, 1976
No. 76-415

—o—

WESLEY WARD,

*Appellant*

vs.

STATE OF ILLINOIS,

*Appellee.*

—o—

**ON APPEAL FROM THE ILLINOIS SUPREME COURT**

—o—

**Jurisdictional Statement Filed September 20, 1976.**
**Jurisdiction Noted January 10, 1977**

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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## CHRONOLOGICAL LIST OF RELEVANT ORDERS AND OTHER PROCEEDINGS

Proceedings in the Tenth Judicial Circuit
Peoria County, Illinois

| Date | Proceedings |
|---|---|
| 10/7/71 | Complaint filed charging Defendant Wesley Ward with obscenity under Chapter 38, § 11-20, Illinois Revised Statutes. |
| Prior to trial | Defendant's Motion to Dismiss filed. |
| (Exact date not of record) | |
| Prior to trial | Motion to Dismiss denied. |
| 3/23/72 | Cause called for trial before Honorable John A. Whitney; State's evidence heard; People's Exhibits 1 and 2 admitted into evidence, namely "Bizarre World" and "Illustrated Case Histories: A Study of Sado-Masochism;" Defendant's Motion for Directed Judgment at the Close of the State's Case in Chief filed; cause taken under advisement. |
| 4/4/72 | Stipulation as to evidentiary matters on file; Order entered denying Defendant's Motion for Directed Judgment, convicting Defendant Wesley Ward of obscenity. |
| 4/17/72 | Hearing on aggravation and mitigation held; defendant sentenced to one day in jail and fined $200.00 |
| 5/8/72 | Defendant's Motion for New Trial or, in the Alternative for Judgment of Acquittal filed. |
| 5/23/72 | Order entered denying Defendant's Motion for New Trial or, in the Alternative for Judgment of Acquittal. |
| 5/30/72 | Notice of Appeal to the Illinois Appellate Court, Third District, filed; Praecipe for Record filed. |

Proceedings in the
Illinois Appellate Court, Third District

2/20/75 Appellate Court in written opinion affirms defendant's conviction.

Proceedings in the
Illinois Supreme Court

5/27/75 Order entered granting Defendant's Petition for Leave to Appeal.

5/14/76 Illinois Supreme Court in written opinion affirms defendant's conviction.

6/1/76 Defendant's Petition for Rehearing filed.

6/7/76 Supplement to Petition for Rehearing filed.

6/28/76 Order denying Defendant's Petition for Rehearing entered.

7/6/76 Order entered by Justice Howard Ryan staying mandate of Illinois Supreme Court pending review by the United States Supreme Court.

8/13/76 Defendant filed Notice of Appeal to United States Supreme Court, together with Notice of Filing.

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## PROCEEDINGS IN THE TENTH JUDICIAL CIRCUIT PEORIA COUNTY, ILLINOIS

[C-2] In the Circuit Court of the Tenth Judicial

Circuit of Illinois

Peoria County

Case No. 71 CM 3858

People of the State of Illinois,
*Plaintiff,*

vs.

Wesley Ward, alias John Doe,
501 SW Adams, Peoria, Ill.,
*Defendant.*
Age Over 21.

### COMPLAINT

(Filed: October 7, 1971)

Officer Carl Tiarks, being first duly sworn, by way of complaint, states that on or about February 12, 1971, in the said County of Peoria and State of Illinois, at Wes Ward's Book Store, 501 SW Adams, Peoria, the offense of Obscenity in violation of Section 11-20 (a-1) of Chapter 38 of the Illinois Revised Statutes, was committed and that affiant has reasonable grounds to believe that Wesley Ward, alias John Doe, hereinafter called the defendant, then and there was guilty of committing the same, in that said defendant did wilfully and unlawfully offer for sale and did through an employee, Elmer Stockman, sell to officer Carl Tiarks two (2) obscene magazines entitled "Bizarre World," No. 1, published by Eros Publishing Co., Inc., Wilmington, Delaware, and "Illustrated Case Histories, a Study of Sado-Masochism," Vol. 3, No. 1, Published by Calga Publishers, Inc., Los Angeles, California, with knowledge of the nature or content thereof, said offense happened at Wes Ward's Book Store, 501 SW Adams St., in the City of Peoria, State of Illinois; con-

trary to the form of the Statute in such cases made and provided, and against the peace and dignity of the people of the State of Illinois and prays that the said defendant may be arrested and dealt with according to law.

Subscribed and sworn to before me:

/s/ Carl R. Tiarks
*Affiant*

John A. Whitney
*Judge*

Dated: September 28, 1971

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## [C-6] MOTION TO DISMISS COMPLAINT

(Filed: Prior to trial [exact date not of record])

Now Come the defendants, Elmer Stockman and Wesley Ward, by their attorney, Donald M. Reno, Jr. of Reno, O'Byrne & Kepley, and pray that this Court will dismiss the complaints and state and allege in support thereof:

1. That the complaint and Statute, Chapter 38, Section 11-20 (1) is so unconstitutionally vague, indefinite, and uncertain that a reasonable person could not ascertain the purpose and intent of the said Statute.

2. That Chapter 38, Section 11-20 (1), is unconstitutional for failing to provide an adversary hearing prior to the issuance of an arrest warrant.

3. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to provide that contemporary community standards are to be established by reference to a national spectrum.

4. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the Constitutional tests for obscenity as dictated in *Redrup v. New York,* 386 U. S. 767, 87 S. Ct. 1414 (1967).

5. That Chapter 38, Section 11-20 (1) is unconstitutional for making it a prohibitive act to exhibit, [C-7] sell, print, or offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene book or magazine when such conduct is Constitutionally protected so long as the materials are not foisted upon an unwilling public, pandered, or sold to juveniles.

6. That Chapter 38, Section 11-20 (1) is unconstitutional for it does not reflect a legitimate interest in the sale, dissemination, and distribution of alleged obscene materials as defined in *United States v. Lethe,* 312 F. Supp. 421 (E. D. Cal., 1970), and *United States v. B & H Dist. Corp.,* 319 F. Supp. 1231 (W. D. Wis., 11/24/70), and *Hayse v. Van Hoomissen,* 321 F. Supp. 642 (D. Ore., 11/19/70).

7. That Chapter 38, Section 11-20 (1) is discriminatory in failing to permit the sale, distribution, and dissemina-

tion of alleged obscene materials to members of the public desiring to purchase the same.

8. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the element that the material in question must be "utterly without any redeeming social value" as held in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 383 U. S. 415, 86 S. Ct. 975 (1966).

9. Chapter 38, Section 11-20 (e) is unconstitutional by providing that the possession of more than three copies of obscene material shall be *prima facie* evidence of an intent to disseminate.

10. That the complaints in question act as a chilling effect upon the defendants' First Amendment freedoms and violate their Constitutional rights pursuant to the Fourteenth Amendment, in that, similar publications are sold openly and publicly in metropolitan areas throughout the United States without being [C-8] subjected to criminal prosecution.

11. That the Court improperly concluded, as a matter of law, pursuant to the adversary hearing, that the publications in question would establish the presence of Constitutional obscenity.

12. That one or more of the preceding paragraphs constitutes violation of the defendants' First, Fifth, and Fourteenth Amendment freedoms as established under the United States Constitution.

Wherefore, the defendants, Elmer Stockman and Wesley Ward, pray that this Honorable Court will dismiss the complaints for one or more of the above reasons.

Elmer Stockman and Wesley Ward
*Defendants*

By: Donald M. Reno, Jr.
of: Reno, O'Byrne & Kepley
*Their Attorney*

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[1] **REPORT OF PROCEEDINGS**

(Filed: May 16, 1972)

Be it remembered that on Thursday, the 23rd day of March, A. D., 1972, the following proceedings came on to be heard before the Honorable John A. Whitney, Judge of said Court.

Appearances:

Dick Williams, Assistant State's Attorney, for the People.

Donald M. Reno, Jr., Attorney at Law, for the Defendant.

Martha Warren, C. S. R., Official Court Reporter, Court House, Peoria, Illinois.

[2] The Court: This is a hearing in connection with 71 CM 3858, being the People of the State of Illinois v. Wesley Ward and the People are represented by Mr. Dick Williams, assistant state's attorney and the defendant is represented by Mr. Donald M. Reno. Do you care to make a statement Mr. Williams?

Mr. Williams: Yes, sir, we are here pursuant to an order entered heretofore setting this matter down for hearing on the merits and another court has heard the various preliminary motions and I believe both of the parties in this case are willing to waive rehearing of these heretofore filed motions at this time?

The Court: Is that correct on behalf of the defendant?

Mr. Reno: It is your Honor. I would like the record to show that previously, we have filed motions in cases that were styled as 71 A 571, 71 A 572 and 71 A 573. There was a motion to dismiss the complaint in those cases. The motion, as I understand, was granted and the complaints were refiled as 71 CM 3858 and Mr. Williams has informed me he is going to advise the Circuit Clerk to add the pleadings which were in the 71 A 571 file to the file of 71 CM

3858 so that we will have a complete record here and Judge Coney previously has ruled on all our pending motions and the defense is satisfied that these motions have been disposed of in such a fashion that we are now at issue on the merits and that is what we are here today on pursuant to notice.

The Court: All right, sir. Is there anything gentle-[3] men in the way of opening statements which you want to make or are they waived?

Mr. Williams: Your Honor, this is an opening statement for the People. The people have only one witness and that will be officer Tjarks [sic] and I will introduce the magazines that he purchased from the Wes Ward's book store at 501 Southwest Adams, Peoria. We will introduce these magazines as exhibits then the court will be required to determine whether or not they are obscene as set out in the framework of the Statute. This is the nature of the case and the type of evidence the people will present.

Mr. Reno: We have no statement.

The Court: Thank you gentlemen. You may call your witness.

CARL TJARKS [sic],

called as a witness on behalf of the People, being first duly sworn by the Clerk of the Court, testified as follows, in answer to

*Direct Examination*, by Mr. Williams

Q. Will you tell the court your name?

A. Carl Tjarks [sic].

Q. And your occupation?

A. Police officer for the city of Peoria.

Q. And how long have you been so employed?

A. 8½ years.



Q. Were you on duty on February 12, 1971?

A. Yes.

Q. And did you have occasion that day to go to 501 Southwest Adams Street, City of Peoria, County of Peoria. State of Illinois?

A. Yes.

Q. What is at that location?

[4] A. Wes Ward's Book Store.

Q. This Book Store, is it designated the Wes Ward Book Store?

A. Yes.

Q. How is that done?

A. Through signs in the window and one over the front door.

Q. Are you acquainted with the owner of this particular establishment?

A. Yes.

Q. Do you know his name?

A. Yes.

Q. What is that name?

A. Wesley Ward.

Q. Have you had occasion to see him managing this store from time to time?

A. He and I have had conversations before.

Q. Has he told you he is the owner of this particular book store during any of these conversations?

A. I can't really remember the specific conversation where he said he was the owner.

Q. But you have seen him working and in fact running this book store, is that true?

A. Yes.

Q. When you went in there that day, what time of the day was it?

A. 1:30 in the afternoon.

Q. Did you have occasion to purchase two magazines at that time and place?

A. Yes, I did.

Mr. Williams: These exhibits have been marked [5] previously as people's exhibits. People's exhibits 1 and 2 during the hearing that was had in this matter and they were brought to that hearing by this officer. Could we continue to use these same exhibit numbers?

The Court: I don't see any reason why you cannot. I take it Mr. Reno has no objection?

Mr. Reno: No, sir.

The Court: Continue to use the markings previously placed on the books, taking them as being marked as exhibits for identification.

Q. I am going to hand you what has been marked for identification as People's exhibit 1 and ask you if you have seen this magazine before?

A. Yes, I have.

Q. Did you mark it?

A. Yes.

Q. When did you do this?

A. Immediately after exiting the store.

Q. Where did you get this particular magazine?

A. Inside the Wes Ward Book Store.

Q. How did you obtain it?

A. It was in a rack. Just picked it off the rack and took it up to the front register, paying the purchase price.



Q. Who sold this magazine to you?

A. An employee of the store. I can't remember his name right now.

Q. He was working there at the time?

A. Yes.

Q. Similarly I hand you what has been marked people's exhibit 2 for identification and ask you if you have seen that before?

[6] A. Yes, I have.

Q. Where did you see that the first time?

A. That was similarly on the rack in Wes Ward's Book Store.

Q. Did you purchase this at the same time and place?

A. Yes, both books were purchased at the same place.

Q. I am going to have the reporter mark this as exhibit three, being a sack. Have you seen this sack before?

A. Yes, sir, this is the sack the two books were placed in after the purchase was made at the front register.

Q. This was done in your presence?

A. Yes.

Q. And you are referring to People's exhibit 3 for identification?

A. Yes, I am.

Q. How is it stamped?

A. Wes Ward's Book Store, Franklin Street, Weses Stand, 501 Southwest Adams, Peoria, Illinois.

Mr. Williams: We would offer into evidence exhibit 3 for identification at this time.

Mr. Reno: We have no objection other than the same general objection that we raised in our motion to dismiss. That's all.

The Court: Shall we show that objection renewed at this time?

Mr. Reno: Yes, please.

Mr. Williams: We also offer plaintiff's exhibits 1 and 2 into evidence.

[7] Mr. Reno: And I would renew my objection previously made.

The Court: If you would show that the objection previously made is renewed and that the objection is denied, People's exhibits 1, 2 and 3 are hereby admitted as People's exhibits 1, 2 nd 3.

Q. Have you talked to Mr. Ward since this occasion?

A. Oh, yes.

Q. Did you talk about anything relating to his management of the book store at 501 Southwest Adams?

A. Yes.

Mr. Reno: I think I would have to object to the conversations between Mr. Ward and Mr. Tjarks [sic] on the grounds we made a motion to produce statements and we didn't receive any to my knowledge.

The Court: Do you have argument on that motion Mr. Williams?

Mr. Williams: None of the statements were reduced to writing in any form so the only argument would be since they weren't reduced to writing they wouldn't be in the nature of anything required to be produced.

Mr. Reno: We take opposition to any statements between Mr. Tjarks [sic] and Mr. Ward that were not produced, oral or otherwise and as further stated in our motion to produce, it is requested that they bring in any and all statements made by the defendant to any law enforcement officials or their agents. Our position would be without production of these statements, it would be improper



for Mr. Tjarks [sic] to testify to the same at this time. I believe the rules are that when [8] there is a motion to produce in this fashion, it is appropriate for the State to, in response to such a motion, reduce to a narrative form a conversation between the law enforcement officials and the defendant.

Mr. Williams: We will withdraw the question.

The Court: Show the question withdrawn.

Mr. Williams: No further questions.

The Court: Mr. Reno?

*Cross-Examination,* by Mr. Reno

Q. Officer Tjarks [sic] did you enter the store on the date in question in order to obtain evidence for a possible criminal prosecution?

A. Yes, sir.

Q. Are you acquainted with the general physical premises of the store?

A. Yes.

Q. In the course of your employment, have you had occasion to go by there in your squad car occasionally?

A. Yes.

Q. And observe the store?

A. Yes.

Q. Is it not true that the windows fronting the store are painted in such a fashion that passers by on Water Street cannot see into the actual store from the street?

A. Yes.

Q. On the date in question, did you see any children, by that I mean any persons under the age you believe to be 18, in the store at the time?

[9] A. No sir.

Q. Were the magazines in question enclosed in cellophane at the time of the purchase?

A. Yes, they were.

Q. You purchased the magazines in question from a Mr. — pardon me, from an employee that was in the store at the time?

A. That's correct.

Q. Mr. Ward was not present in the store at the time the magazines were purchased?

A. No.

Mr. Reno: No further questions.

The Court: Any redirect?

Mr. Williams: Nothing further. People rest.

The Court: You may step down. The state has rested Are there any motions at this time?

Mr. Reno: There are your Honor, we have a motion for directed judgment at the close of the State's case in chief, copy of the same and we are also handing to the court 11 Xerox copies of the cases which we are citing to the court.

(Further argument not included in this record as per Mr. Reno's letter of April 21, 1972.)

(Matter taken under advisement by Court until March 30, 1972 at 9:30 A.M.)

Which Were All the Proceedings Had in Said Matter on This Day.

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## MOTION FOR DIRECTED JUDGMENT AT THE CLOSE OF THE STATE'S CASE IN CHIEF

(Presented to the court: March 23, 1972)

Now Come the defendants, Elmer Stockman and Wesley Ward, by their attorney, Donald M. Reno, Jr. of Reno, O'Byrne & Kepley, and pray that this Court will enter judgment for the defendants, and allege and state in support thereof:

1. That the State has wholly and totally failed to present a scintilla of evidence bearing upon the presence of the Constitutional test and elements of obscenity as defined in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 383 U.S. 415, 86 S. Ct. 975 (1966), to-wit: (1) that the publications appeal to the prurient interest of the average adult, (2) that the materials are patently offensive, in that they substantially exceed contemporary community standards in the representation of sexual conduct, and (3) that the materials are utterly void of any redeeming social value.

The failure of the State to establish a *prima facie* case by the introduction of affirmative testimony relating to the three Constitutional elements defining obscenity, as a matter of law, entitles the defendants to a directed judgment as more fully set forth and argued in the following cases:

*U. S. A. v. Groner,* — F. 2d — (5th Cir., 1/11/72);

*U.S. v. Klaw,* 350 F. 2d 155, 157, 160, 165, 166, 167, 168, 170 (2d Cir., 1965);

*In Re 7 Magazines,* 268 A. 2d 707, 712, 713 (S. Ct. R. I., 1970);

*City of Phoenix v. Fine,* 4 Ariz. App. 303, 420 P. 2d 26, 28, 30 (1966);

*Keuper v. Wilson,* 111 N. J. Super. 489 268 A 2d 753 (1970);

*Duggan v. Guild Theatre*, 436 Pa. 191, 258 A. 2d 858 (S. Ct. Pa., 1969);

*Ramirez v. State of Oklahoma*, 430 P. 2d 826, 827-829 (1967);

*United States v. 37 Photographs*, Cv. No. 69-2242-F, U. S. D. C. of Cent. Dist. Cal. (10/5/71);

*Dunne v. Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965);

*House v. Commonwealth of Virginia*, 210 Va. 121, 169 S. E. 2d 572, 576 (S. Ct. Va., 1969);

*Pinkus v. Pitchess*, 429 F. 2d 416 (9th Cir., 1970).

That it was a violation of the defendants' due process for this court to infer that a *prima facie* case has been established without evidence of the defendants' guilt. (*Thompson v. City of Louisville*, 362 U. S. 199, 206, 80 S. Ct. 624, 629 (1960).)

2. That the State has wholly and totally failed to establish a *prima facie* case that the defendants had knowledge of the contents of the publications. Knowledge must be established as a matter of law. (*Smith v. California*, 361 U. S. 147, 80 S. Ct. 215 (1959).)

3. That as a matter of law the publications in issue are Constitutionally protected when viewed in the perspective of *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967), and its progeny.

4. That Chapter 38, Section 11-20 (1) is unconstitutional for making it a prohibitive act to exhibit, sell, print, or offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene book or magazine when such conduct is Constitutionally protected so long as the materials are not foisted upon an unwilling public, pandered, or sold to juveniles.

6. That Chapter 38, Section 11-20 (1) is unconstitutional for it does not reflect a legitimate interest in the



sale, dissemination, and distribution of alleged obscene materials as defined in *United States v. Lethe*, 312 F. Supp. 421 (E. D. Cal., 1970), and *United States v. B & H Dist. Corp.*, 319 F. Supp. 1231 (W. D. Wis., 11/24/70), and *Hayse v. Van Hoomissen*, 321 F. Supp. 642 (D. Ore., 11/19/70).

7. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the element that the material in question must be "utterly without any redeeming social value" as held in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U. S. 415, 86 S. Ct. 975 (1966).

8. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the Constitutional tests for obscenity as dictated in *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967).

9. That the complaint and Statute, Chapter 38, Section 11-20 (1) is so unconstitutionally vague, indefinite, and uncertain that a reasonable person could not ascertain the purpose and intent of the said Statute.

Wherefore, the defendants, Elmer Stockman and Wesley Ward, pray that this Honorable Court will enter judgment of acquittal for the defendants and against the People for one or more of the above reasons.

Elmer Stockman and Wesley Ward
By: Donald M. Reno, Jr.
Their Attorney

[C-21] STIPULATION

(Filed: April 4, 1972)

Now comes Wesley Ward by his attorney, Donald Reno, Jr., and the People by Dick L. Williams, Assistant State's Attorney, and stipulates as follows:

That Wesley Ward is the active owner of the Wesley Ward Bookstore at 501 S. W. Adams Street, Peoria, Illinois.

That Wesley Ward was actively participating in the management of the Wes Ward Bookstore on February 12, 1971.

That Wesley Ward was responsible for and supervised purchasing, inventory control and sales of the Wes Ward Bookstore, 501 S. W. Adams Street, Peoria, Illinois, on February 12, 1971.

Dick L. Williams
Assistant State's Attorney
Donald Reno, Jr.

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[C-22] JUDGMENT OF TRIAL COURT AND DENIAL OF MOTION FOR DIRECTED JUDGMENT, ETC.

Order

(Filed: April 4, 1972)

The Court having heard arguments on the Motion for Directed Judgment in the closing of the State's evidence the Court does hereby deny a judgment of acquittal. The Court further finds that the Defendant Wesley Ward be and is hereby convicted of the offense of obscenity as set forth in the complaint number 71CM-3858.

This matter is hereby set down for a hearing of aggravation and mitigation of the offense and sentencing on April 13, 1972 at 2:00 P. M.

/s/ John A. Whitney
Judge of the Tenth Judicial Circuit

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[C-23] **ORDER**

(Filed: April 17, 1972)

Now on this 17th day of April, 1972, come the People of the State of Illinois, by Dick L. Williams, Assistant State's Attorney, Peoria County, Illinois, and also comes the defendant in his own person accompanied by his attorney, Mr. Donald M. Reno, Jr.

A hearing in aggravation and mitigation was held, neither party submitted any formal evidence.

The defendant is hereby sentenced to one (1) day in the Peoria County Jail and fined $200.00 and costs.

/s/ John A. Whitney

Judge John Whitney
Associate Judge

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[C-24] **MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE MOTION FOR JUDGMENT OF ACQUITTAL**

(Filed: May 8, 1972)

Now Comes the defendant, Wesley Ward, by his attorney, Donald M. Reno, Jr. of Reno, O'Byrne & Kepley, and prays that this Court will enter judgment of acquittal for the defendant, or in the alternative, grant a new trial, and alleges and states in support thereof:

1. That the State has not proven the defendant's guilt beyond a reasonable doubt.

2. That the State wholly and totally failed to present a scintilla of evidence bearing upon the presence of the Constitutional test and elements of obscenity as defined in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U. S. 415, 86 S. Ct. 975 (1966), to-wit: (1) that the publications appeal to the prarient interest of the average adult, (2) that the materials are patently offensive, in that they substantially exceed contemporary community standards in the representation of sexual conduct, and (3) that the materials are utterly void of any redeeming social value.

The failure of the State to Establish a *prima facie* [C-25] case by the introduction of affirmative testimony relating to the three Constitutional elements defining obscenity, as a matter of law, entitles the defendant to a directed judgment as more fully set forth and argued in the following cases:

*U. S. A. v. Groner*, — F. 2d — (5th Cir., 1/11/72);

*U. S. v. Klaw*, 350 F. 2d 155, 157, 160, 165, 166, 167, 168, 170 (2d Cir., 1965);

*In Re 7 Magazines*, 268 A. 2d 707, 712, 713 (S. Ct. R. I., 1970);

*City of Phoenix v. Fine*, 4 Ariz. App. 303, 420 P. 2d 26, 28, 30 (1966);

*Keuper v. Wilson*, 111 N. J. Super. 489, 268 A. 2d 753 (1970);

*Duggan v. Guild Theatre*, 436 Pa. 191, 258 A. 2d 858 (S. Ct. Pa. 1969);

*Ramirez v. State of Oklahoma*, 430 P. 2d 826, 827 829 (1967);

*United States v. 37 Photographs*, Cv. No. 69-2242-F, U. S. D. C. of Cent. Dist. Cal. (10/5/71);

*Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A. 2d 751 (1965);

*House v. Commonwealth of Virginia*, 210 Va. 121, 169 S. E. 2d 572, 576 (S. Ct. Va., 1969);

*Pinkus v. Pitchess*, 429 F. 2d 416 (9th Cir., 1970).

That it was a violation of the defendant's due process for this court to infer that a *prima facie* case had been established without evidence of the defendant's guilt *(Thompson v. City of Louisville*, 362 U. S. 199, 206, 80 S. Ct. 624, 629 (1960)).

2. [sic] That the State has wholly and totally failed to establish a *prima facie* case that the defendant had *knowledge* of the contents of the publications. Knowledge must be established as a matter of law. *(Smith v. California*, 361 U. S. 147, 80 S. Ct. 215 (1959).)

[C-26] 3. That as a matter of law the publications in issue are Constitutionally protected when viewed in the perspective of *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967), and its progeny.

4. That Chapter 38, Section 11-20 (1) is unconstitutional for making it a prohibitive act to exhibit, sell, print, or offer to sell, give away, circulate, publish, distribute or attempt to distribute any obscene book or magazine when such conduct is Constitutionally protected so long as the materials are not foisted upon an unwilling public, pandered, or sold to juveniles.



5. That Chapter 38, Section 11-20 (1) is unconstitutional for it does not reflect a legitimate interest in the sale, dissemination, and distribution of alleged obscene materials as defined in *United States v. Lethe*, 312 F. Supp. 421 (E. D. Cal., 1970) and *United States v. B & H Dist. Corp.*, 319 F. Supp. 1231 (W. D. Wis., 11/24/70) and *Hayse v. Van Hoomissen*, 321 F. Supp. 642 (D. Ore., 11/19/70).

6. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the element that the material in question must be "utterly without any redeeming social value" as held in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U. S. 415, 86 S. Ct. 975 (1966).

7. That Chapter 38, Section 11-20 (1) is unconstitutional for failing to incorporate the Constitutional tests for obscenity as dictated in *Redrup v. New York*, 386 U. S. 767, 87 S. Ct. 1414 (1967).

8. That the complaint and statute, Chapter 38, Section 11-20 (1) is so unconstitutionally vague, indefinite, and uncertain that a reasonable person could not ascertain the purpose and intent of the said statute. [C-27] Wherefore, the defendant, Wesley Ward, prays that this Honorable Court will enter a judgment of acquittal for the defendant or in the alternative grant a new trial.

Wesley Ward, Defendant

By: Donald M. Reno, Jr.
His Attorney

[C-28] ORDER

(Filed: May 23, 1972)

The Court having considered arguments of counsel on the defendant's Motion for New Trial or in the Alternative Motion for Judgment of Acquittal does hereby deny said Motions.

Defendant is required to file notice of appeal within 30 days or by June 23, 1972.

/s/ Judge John Whitney

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NOTICE OF APPEAL

(Filed: May 30, 1972)

[C-29] An appeal is taken from the order and judgment described below.

1. Court to which appeal is taken: Illinois Appellate Court, Third District.

2. Name of Appellant and addess to which notice shall be sent:

Name: Wesley Ward

Address: 501 Southwest Adams, Peoria, Illinois 61601

3. Name and address of Appellant's attorney on appeal:

Name: Donald M. Reno, Jr.

Address: Reno, O'Byrne & Kepley, 501 West Church Street, Champaign, Illinois 61820

4. Date of Judgment: April 4, 1972.

5. Offense of which convicted: Chapter 38, Section 11-20—sale of obscene materials.

6. Sentence: Entered on April 17, 1972, one day in jail and $200 fine.

7. Denial of Post-trial Motion—order entered May 23, 1972.

Wesley Ward
Defendant

By: Donald M. Reno, Jr.
His Attorney

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[C-31] PRAECIPE FOR RECORD

(Filed: May 30, 1972)

To the Clerk of the Circuit Court of Peoria County:

You are hereby directed to make up the record in the above-entitled case for transmittal to the Appellate Court of Illinois, Third District, said record to contain the following:

1. Complaint.

2. Motion to dismiss complaint.

3. Motion for directed judgment at the close of the State's case in chief.

4. Stipulation between Attorney Donald Reno, Jr. and Dick L. Williams.

5. Motion for new trial or in the alternative motion for judgment of acquittal and order denying same.

6. Order of sentence and fine.

7. Notice of Appeal.

8. Praecipe for record.

9. Any and all written orders and docket entries by the court.

10. The transcript of the proceedings.

[C-32] 11. The exhibits entered into evidence by the court. (The Magazines, "Illustrated Case Histories—A Study of Sado-Masochism," Vol. 3, No. 1, and "Bizarre World," No. 1.)

Donald M. Reno, Jr.

Attorney for Defendant-Appellant

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## PROCEEDINGS IN THE ILLINOIS APPELLATE COURT, THIRD DISTRICT

Appeal from the Circuit Court of the
Tenth Judicial Circuit, Peoria County, Illinois.

(Filed: February 20, 1975)

Mr. JUSTICE STOUDER delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of Peoria County finding Defendant, Wesley Ward, guilty of violating Illinois Revised Statutes, 1971, ch. 38, par. 11-20 (a) (1) by selling two obscene publications. Defendant waived a jury and after bench trial was found guilty and sentenced to one day in jail and fined $200. The only witness for the State was the complaining police officer who testified he purchased the two publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism", at defendant's store. The police officer's testimony and the magazines themselves were the sole evidence presented by the State. Defendant presented no evidence and after his motion for judgment was denied judgment was entered against the defendant.

There are three principal issues on this appeal. The resolution of each of these is governed by the case of *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 which was granted certiorari by the U. S. Supreme Court in 413 U. S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046. The Supreme Court vacated the judgment and remanded the case to the Illinois Supreme Court, — Ill. 2d — (March, 1974, Docket Nos. 43974, 44449 cons.) which affirmed the convictions of the defendant. The United States Supreme Court in vacating and remanding the initial decision in the *Ridens* case directed the Illinois Supreme Court to reconsider the case in light of the holdings of the United States Supreme Court in *Miller v. California*, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, and other related cases decided by the Court at the same time. After reconsideration of the *Ridens* case the Illinois Supreme Court reaffirmed the defendant's

conviction and concluded the Illinois Obscenity Statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) complied with the standards announced in the United States Supreme Court cases.

The first issue is whether the State's evidence consisting of magazines made up almost exclusively of photographs constituted sufficient proof to establish violation of the obscenity statute and therefore, whether the failure to present opinion testimony as to contemporary community standards was fatal to the State's case. The Illinois Supreme Court in *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 held such opinion testimony was not required. The court there held the publications themselves constituted sufficient evidence to support defendant's conviction for violating the statute.

The second issue is whether it was necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults in order to convict defendant of violating the statute by selling the magazines. The court in *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 held defendant's claim that the obscenity ordinance and code were deficient because they did not require proof that the offending publications were sold to minors or intruded upon the privacy of unwilling adults was without merit. In accord with this case we hold here that it was not necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults.

The final issue on this appeal is whether the two publications were obscene as a matter of law. Again, the case of *People v. Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 is dispositive of the issue in the case at bar. The magazines in this case do not differ in any substantial sense from the magazines described in *Ridens* and they fall within that category prohibited by the statute. See also, *People v. Gould*, — Ill. 2d — (September, 1974 Docket Nos. 42652, 42662 cons.)

For the foregoing reasons the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

Dixon, J. and Scott, P. J. concur.

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(Supreme Court Seal)

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

Clell L. Woods
Clerk

May 27, 1975

Telephone
Area Code 217
782-2035

Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
Attorneys at Law

501 West Church Street
Champaign, Illinois 61820

No. 47479—People State of Illinois, respondent, vs. Wesley Ward, petitioner. Leave to appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today *allowed* the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods,
Clerk of the Supreme Court

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PROCEEDINGS IN THE
ILLINOIS SUPREME COURT

(Filed: May 14, 1976)

Docket No. 47479—Agenda 4—March, 1976.

THE PEOPLE OF THE
STATE OF ILLINOIS, Appellee,

vs. WESLEY WARD, Appellant.

MR. JUSTICE CREBS delivered the opinion of the court:

The defendant was convicted of the offense of obscenity after a bench trial in the circuit court of Peoria County. The court ruled that the defendant, the operator of a book store, had violated Section 11-20 (a) (1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1971, ch. 38, par. 11-20 (a) (1)) by selling two obscene publications. The defendant was sentenced to spend one day in the county jail and was fined $200 and costs.

The defendant presented no evidence in his own behalf at trial but did file a motion for a directed verdict at the close of the State's case. After this motion was denied and a judgment of conviction was entered, the defendant filed a post-trial motion in which he alleged, *inter alia*, that the obscenity statute was unconstitutional and that the magazines in question were constitutionally protected. The post-trial motion was denied, and the defendant's conviction was subsequently affirmed. *(People v. Ward*, 25 Ill. App. 3d 1045.) We have granted the defendant's petition for leave to appeal to this court.

The defendant first contends that the Illinois obscenity statute is unconstitutional in that it does not specifically define the type of sexual conduct that may not be depicted. The defendant relies on the case of *Miller v. California*, 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, in which the United States Supreme Court announced new criteria to be used in judging the constitutionality of obscenity statutes. The court determined that the three questions



to be considered in such a case are: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Supreme Court stated that the conduct whose depiction is proscribed by obscenity statutes must be "specifically defined by the applicable state law, as written or authoritatively constructed." 413 U. S. 15, 24, 37 L. Ed. 2d 419, 430-31, 93 S. Ct. 2607, 2615.

The Illinois obscenity statute states in pertinent part:

"(a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene;

• • •

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." (Ill. Rev. Stat. 1971, ch. 38, par. 11-20.)

The defendant now argues that the statute does not sufficiently define the type of conduct whose depiction is proscribed.

In *People v. Ridens,* 51 Ill. 2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia,* the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. *(Ridens v. Illinois,* 413 U. S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. *(People v. Ridens,* 59 Ill. 2d 362, *cert. denied,* 421 U. S. 993, 44 L. Ed. 2d 483, 95 S. Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the "prurient interest" a "shameful or morbid interest in nudity, sex or excretion." The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term "obscenity" with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections.

The defendant also contends that the obscenity statute is unconstitutional as applied to him because the State elicited no evidence suggesting that the publications in question were forced upon unwilling audiences or made available to juveniles. The defendant argues that the statute cannot be constitutionally applied to cases in which the sexually explicit materials are sold or distributed only to consenting adults. This argument is based on the allegation that contemporary community standards are not offended unless the obscene materials are forced upon unwilling audiences or made available to minors.



The defendant's argument is without merit. Contemporary community standards are relevant in determining whether a publication is obscene but bear no relevance to the questions of how or to whom obscene materials may be distributed. If a publication is determined to be obscene, it is not entitled to constitutional protection. *(Miller v. California,* 413 U. S. 15, 23, 37 L. Ed. 2d 419, 430, 93 S. Ct. 2607, 2614.) The Illinois General Assembly chose to make the commercial distribution of obscene materials a crime. This was within the police power of the State. The sale of obscene publications is a violation of the criminal law, therefore, even if the publications are not forced upon unwilling audiences or made available to minors.

The final contention made by the defendant is that the two publications are not obscene and thus are entitled to protection under the first amendment to the United States Constitution and Article I, Section 4, of the Illinois Constitution. In obscenity cases, a reviewing court must make an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. *(People v. Ridens,* 59 Ill. 2d 362.) After reviewing the publications at issue in this case, we have no hesitation in affirming the holding of the lower courts that the materials are in fact obscene. We find that the average person applying contemporary community standards would consider that, taken as a whole, the sole appeal of the two publications is to the prurient interest and that the dominant theme of the magazines is a morbid interest in nudity and sex. Moreover, we regard the publications as depicting, in a patently offensive way, sexual conduct defined by the obscenity statute, as authoritatively construed in Ridens II. In addition, the magazines go substantially beyond customary limits of candor in such depiction. We also find that the magazines have no literary or artistic merit and that they are utterly without redeeming social value. For the foregoing reasons we hold that the two publications are obscene, and the judgment of the appellate court is affirmed.

*Judgment affirmed*

## PETITION FOR REHEARING

(Filed: June 1, 1976)

The defendant-appellee, Wesley Ward, prays that this Court would grant his petition for rehearing, and would reverse its judgment affirming his conviction. In support of his petition for rehearing, the defendant-appellant states as follows:

The Illinois Supreme Court erroneously failed to find unconstitutional the Illinois Obscenity Statute, Chapter 38, § 11-20 for failure to meet the specificity requirements of *Miller v. California,* 413 U. S. 15, 93 S. Ct. 2607 (1973). The Illinois Supreme Court has had multiple opportunities to meet the guidelines of *Miller,* if a proper judicial construction were permissible, and has failed to do so.

This very issue is currently pending in a Federal Court in the Northern District of Illinois, in a cause styled *Eagle Books, Inc., et al. v. Philip Reinhard, et al.,* No. 76-C-20014. This matter involves the convening of a three-judge Federal court to pass on the validity of the Illinois Obscenity Statute, as construed by this Court in *People v. Ridens,* 59 Ill. 2d 362, 321 N. E. 2d 264 (1974). Federal District Judge Joel Flaum, in passing on the plaintiffs' contentions with regard to the Illinois Obscenity Statute, found that a substantial federal question had been presented and ordered the convening of a three-judge court on April 15, 1976. A copy of his memorandum opinion convening said court is attached to this petition for rehearing.

On May 14, 1976, oral arguments were presented to Seventh Circuit Court of Appeals Circuit Justice Walter Cummins and Federal District Judges Joel Flaum and Hubert Will, in Federal District in Chicago. That court is also aware of the opinion announced in this pending case on May 14, 1976, and a decision is currently pending in the Federal case.

On these facts and authority, it is submitted that the Illinois Supreme Court should reconsider its views con



cerning the Illinois Obscenity Statute, holding the same unconstitutional and reversing the defendant's conviction. In addition, it is submitted that the materials in question could not be held obscene under any of the guidelines previously announced by the Illinois Supreme Court.

For these reasons, the defendant prays that the Court would grant its petition for rehearing and would reverse his conviction in this case.

Respectfully submitted,

WESLEY WARD, Defendant-Appellant

BY: J. STEVEN BECKETT

/s/ J. Steven Beckett

RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois

Attorneys for Defendant-Appellant

(Memorandum opinion of Joel M. Flaum, Federal District Judge, in *Eagle Books, Inc., et al. v. Philip Reinhard, et al.,* No. 76-C-20014, omitted in printing.)

## SUPPLEMENT TO PETITION FOR REHEARING

(Filed: June 7, 1976)

The defendant-appellant, Wesley Ward, supplements his Petition for Rehearing previously filed in this Court by providing this Court the opinion of the United States District Court for the Northern District of Illinois, Western Division, in *Eagle Books, Inc., et al. v. Reinhard, et al.*, No. 76-C-20014. This opinion holds unconstitutional the Illinois Obscenity Statute, Chapter 38, § 11-20 as written and as construed by this Court in *People v. Ridens* (Ridens II), 59 Ill. 2d 362, 321 N. E. 2d 264 (1974), for failing to meet the specificity requirements of *Miller v. California* 413 U. S. 15, 93 S. Ct. 2607 (1973).

The defendant-appellant respectfully submits that this opinion is persuasive authority to grant a rehearing, reverse defendant's conviction, and hold the Illinois Obscenity Statute unconstitutional.

Respectfully submitted,

/s/ J. Steven Beckett

RENO, O'BYRNE & KEPLEY

Attorney for Defendant-Appellant

(Opinion of three-judge court in *Eagle Books, Inc., et al. v. Reinhard, et al.*, No. 76-C-20014, now reported at 418 F. Supp. 345, omitted in printing.)

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(Supreme Court Seal)

STATE OF ILLINOIS

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

June 28, 1976

Clell L. Woods
Clerk

Telephone
Area Code 217
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Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
Attorneys at Law

501 West Church Street
Champaign, Illinois 61820

No. 47479—People State of Illinois, appellee, vs. Wesley Ward, appellant. Appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods

Clerk of the Supreme Court

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## ORDER

(Filed: July 6, 1976)

IT IS HEREBY ORDERED that the mandate in the above-captioned cause be stayed pending review by the United States Supreme Court until further order of this Court.

ENTERED this — day of ——, 1976. (no date on record)

/s/ Justice Howard C. Ryan

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## NOTICE OF FILING

(Filed: August 13, 1976)

TO: Raymond McKoski
Assistant Attorney General
State of Illinois

188 West Randolph, Suite 2200
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on August 12, 1976, I have filed, by mailing, with the Clerk of the Illinois Supreme Court, a copy of the attached Notice of Appeal.

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois

/s/ J. Steven Beckett

Attorney for defendant-appellant

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## NOTICE OF APPEAL

(Filed: August 13, 1976)

Notice is hereby given that Wesley Ward, defendant-appellant in the above captioned-cause, appeals to the Supreme Court of the United States from an opinion dated May 14, 1976, entered by the Supreme Court of the State of Illinois, and from the order of the said Supreme Court of the State of Illinois, dated June 28, 1976, denying the Petition for Rehearing filed by the defendant-appellant. Said opinion of the Illinois Supreme Court upheld the constitutionality of Illinois Revised Statutes (1976), Chapter 38, § 11-20, and held certain materials unprotected by the Constitution of the United States, which materials the defendant was convicted of distributing. Defendant-appellant takes this appeal pursuant to 28 U. S. C. 1257 (2).

Respectfully submitted,

/s/ J. Steven Beckett
Reno, O'Byrne & Kepley
501 West Church
Champaign, Illinois 61820

Attorney for Defendant-Appellant

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## REQUEST FOR CERTIFICATION OF RECORD

(Filed: August 13, 1976)

TO: Clell L. Woods, Clerk
Illinois Supreme Court

Supreme Court Building
Springfield, Illinois

Pursuant to United States Supreme Court Rule 12, the defendant-appellant, WESLEY WARD, requests that you certify the entire record of proceedings in this cause to provide for its transmission to the United States Supreme Court on or before September 26, 1976. Specifically, you are asked to certify the publications at issue in this cause, namely: "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" for transmission to the United States Supreme Court on or before the afore-mentioned date.

The defendant-appellant shall notify you when his appeal has been docketed in the United States Supreme Court to provide for transmission of the record in this cause.

WESLEY WARD, Defendant-Appellant

BY: J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY

501 West Church
Champaign, Illinois

/s/ J. Steven Beckett

His Attorneys